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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 250

ARTHUR BINGAMAN, ADMINISTRATOR OF THE ESTATE OF ALVIN A. BINGAMAN, DECEASED,

Appellant,

vs.

ERIC H. REHN AND JOHN P. MAINELLI, DOING BUSINESS UNDER THE NAME AND STYLE OF JOHN P. MAINELLI CONSTRUCTION COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

JURISDICTIONAL STATEMENT

I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

This is an appeal under Section 1257 (2) Chapter 81, Part IV, Title 28, U. S. C. (which is based on Title 28, U. S. C., 1940 ed., #344, 237, 36 Stat. 1156, 43 Stat. 937, 45 Stat. 54), from a final judgment of the Supreme Court of Nebraska entered the 14th day of May, 1949, and from a final judg-

ment dated June 14, 1949. The facts from which it arises may be briefly stated as follows:

On November 7, 1946, Alvin A. Bingaman was killed and Eric H. Rehn, appellee herein, and three other employees received injuries in an accident occurring in the City of Omaha, Douglas County, Nebraska. Eric H. Rehn filed an action in the District Court of Douglas County, Nebraska on March 28, 1947, against Arthur Bingaman, in which action recovery of damages allegedly caused by the negligence of said Alvin A. Bingaman was sought. John P. Mainelli was also made a defendant in the same action, as he was Rehn's employer, and entitled to be subrogated under Section 48-118 of the Workmen's Compensation Act. Trial was had and judgment of $10,000.00 for plaintiff was entered. Defendant Arthur Bingaman made, in addition to other motions, a motion to vacate the judgment and dismiss the action, on the ground that the District Court did not have jurisdiction of the subject matter of the action. Objection to the court's jurisdiction of the subject matter of the action was based on two different grounds: One of those grounds, that the County Court had exclusive original jurisdiction of claims against the estates of decedents, was sustained by this Court in its opinion of April 14, 1949. The other ground involved the constitutional questions involved in this application for appeal. Defendant Bingaman in briefs and oral argument submitted to the trial District Court, contended that in Nebraska, there was no survival of a cause of action for personal injuries where the alleged wrong-doer had died. Defendant Bingaman, in briefs and oral argument submitted to the trial Court, contended that earlier Nebraska cases to the effect that the type of action involved survived the death of the wrong-doer had been overruled. After his various motions had been overruled by the trial Court, defendant Bingaman

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appealed to the Supreme Court of the State of Nebraska. He assigned as error the refusal of the trial Court to sustain his motions to dismiss. In his briefs filed in this Court, he reiterated that prior Nebraska decisions were wrong.

On April 14, 1949, the Supreme Court of the State of Nebraska, filed its opinion, in which it upheld defendant Bingaman's assertion that the County Court of Douglas County, Nebraska, had exclusive original jurisdiction of claims against the Estate of decedent, and held that Rehn's action should be dismissed. The opinion, however, held contrary to appellant Bingaman's contention, that a cause of action survived the death of an alleged wrong-doer.

Motion for rehearing as to that part of the decision of April 14, 1949, adverse to appellant Bingaman's contention, was filed on the 30th day of April, 1949, and such motion for rehearing was overruled by the Supreme Court on May 14, 1949.

An application for leave to file a second motion for rehearing and brief in support thereof was filed in the Supreme Court of the State of Nebraska on June 14, 1949, and such application was denied June 14, 1949.

II. State Statute the Validity of Which Is Involved

There was thus drawn in question the validity, under the Fourteenth Amendment, of certain statutory provisions of the State of Nebraska. These provisions are set out in full below, as they appear in the 1943 Revised Statutes of the State of Nebraska, and amendments thereto.

Sec. 49-101—*Common law; applicability.* So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this State, is adopted and declared to be law within the State of Nebraska.

Sec. 48-118. *Subrogation.* Where a third person is liable to the employe or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employe or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employe or dependents, but such employer may recover any amount which such employe or his dependents should have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employe or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation. Provided, however, that nothing in this section or act shall be construed to deny the right of an injured employe or of his personal representative to bring suit against said third person in his own name or in the name of the personal representative based upon said liability; but in such an event an employer having paid or paying compensation to the said employe or his dependents shall be made a party to the suit for the purpose of reimbursement, under the above provided subrogation, of any compensation paid. (1913, p. 585; R. S. 1913, C. S. 1922, 3041; 1929 p. 489.)

Sec. 13, Art. I, Constitution of the State of Nebraska—*Justice administered without delay.* All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay.

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III. Date of Judgment and Application for Appeal

Order overruling appellant Bingaman's motion for a rehearing as to those parts of the opinion of April 14, 1949, adverse to him, was filed by the Supreme Court of Nebraska on May 14, 1949. Appellant Bingaman's application to file a second motion for rehearing filed June 14, 1949, was denied June 14, 1949.

Petition for appeal on those parts of the judgment of April 14, 1949, adverse to said defendant Bingaman, were presented to Chief Justice Simmons of the Supreme Court of Nebraska, on the 20th day of June, 1949.

IV. Manner in Which the Federal Question Was Raised

The Federal question was raised in the District Court (the trial Court) by motion to dismiss plaintiff Rehn's action (Trans. 46), by presenting in a brief filed with the trial Court and in oral argument before the trial Court, objections to the soundness and validity of the decisions in "In re Grainger's Estate" and "Wilfong *v.* Omaha & Council Bluffs St. Ry. Co." The *Grainger* case involved the construction of what is now Sec. 49-101, R. S. Nebr. 1943, referred to heretofore. It will be noted that 49-101, R.S. Nebraska, 1943, refers directly to the Constitution of the United States, viz.: "So much of the common law of England as is applicable and *not inconsistent with the Constitution of the United States* * * *". The *Grainger* case also specifically referred to the plaintiff's claim to "equal protection of the laws," which language is the same as appears in Section 1, Amendment XIV. The theory on which the decision in the *Grainger* case was based is evidently the idea that if the common law of England caused an action for personal injuries to abate on the death of the wrong-doer, it was contrary to the "equal protection of the laws" provision of the U. S. Constitution, and since,

by its very own terms, 49-101 did not adopt any of the common law of England inconsistent with the Constitution of the United States, 49-101 did not adopt the English common law as to the survival of causes of action for personal injuries. Appellant Bingaman contended that the purported discrimination, from which the plaintiff in the *Grainger* case requested protection did not exist, and in support of that contention cited the later Nebraska decision of *Sampson* v. *Neuman,* 142 Neb. 556, 7 N. W. (2) 60.

The other Nebraska case on which plaintiff Rehn based his right to maintain an action against the personal representative of an alleged tort-feasor was the case of *Wilfong* v. *O. & C. B. St. Ry. Co.,* 129 Neb. 600, 262 N. W. 537. The *Wilfong* case opinion is founded on the Grainger opinion, the construction of Section 49-101, and, in addition Section 13, Article I, Constitution of the State of Nebraska, which reads: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, etc." Plaintiff Wilfong claimed that that provision of the Nebraska Constitution of itself without more gave him an action against a tort-feasor. Appellant Bingaman opposed the reasoning as to the self-executing properties of the above constitutional provision, and pointed out in denial of the reasoning—of both the *Grainger* and *Wilfong* cases—that it had been held by the Nebraska Supreme Court that no action for wrongful death existed in Nebraska by virtue of either Section 13, Article I, Nebraska Constitution, or by virtue of the original version of the common law or any Nebraska modification thereof. It would not be *fair to him (equal protection of the laws)* appellant Bingaman argued, to say that for an injury not resulting in death, Section 13, Article I, and the common law of Nebraska gave the living injured person a cause of action against him, when the aforesaid Constitution and Nebraska common law gave

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no cause of action for what is commonly supposed to be the worst injury of all—one resulting in death.

Objection was, likewise, made by appellant Bingaman, in the District Court to any interpretation of Section 48-118, (which does not provide for the survival of the cause of action against a third person wrong-doer) which would apply the erroneous rules of the *Grainger* and *Wilfong* cases to any action under such section.

After his motion for dismissal of plaintiff Rehn's action in District Court was denied (Trans. 53), defendant Bingaman appealed to the Supreme Court of Nebraska, assigning as error the trial Court's refusal to sustain his motion to dismiss, and filed a brief in which he reiterated the position he had asserted in the lower Court, to the effect that no cause of action survived the death of Alvin A. Bingaman. The following excerpts from appellant Bingaman's original brief in the Supreme Court disclose the constitutional questions involved in the action:

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"Statement of Questions Involved

(1)—Did the District Court lack jurisdiction of the subject matter of the action, because:

(B)—No cause of action for personal injury having accrued before the death of the personal representative's intestate,—no cause of action survived his death?

(C)—No cause of action for personal injury survived the death of the alleged tort-feasor, even if a cause of action had accrued before his death?

(D)—Because no provision is made in Sec. 48-118 (1943) R. S. for the survival of the causes of action conferred by said section?

(2)—Does the petition state a cause of action?"

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"Arthur Bingaman, Administrator, filed a motion for an order vacating and setting aside the verdict and judgment and to dismiss the action for the reason the Court did not then, and never did have, jurisdiction of the subject matter of this action, and that the purported verdict and judgment were at all times void."

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"After verdict and judgment, defendant, Arthur Bingaman, Administrator, filed a motion for new trial, to vacate the judgment and verdict and to dismiss the action.

The Court overruled all of said motions and the Administrator perfected this appeal."

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"Assignments of Error

I. The Court erred in overruling motion of defendant Arthur Bingaman, administrator (T. 46) for an order vacating and setting aside the verdict rendered herein and the judgment entered thereon and dismissing the action, said motion being for the following reasons:

A. That this Court does not now and never did have jurisdiction of the subject matter of this action.

B. That the purported verdict rendered herein and the judgment entered thereon is now and was at all times void."

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"Propositions of Law

XII. Want of jurisdiction of the subject matter of an action is a defect which it is the duty of the court to

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notice of its own motion, by dismissal of the action or other suitable action, at any state of the proceeding.

Lippincott *v.* Wolski, 147 Neb. 930, 25 N. W. (2) 747.

XIII. Where the court has no jurisdiction over the subject matter of an action, all proceedings in such action are void.

Wolski *v.* Lippincott, 147 Neb. 944, 25 N. W. (2) 754.

XIV. Objections that court does not have jurisdiction of the subject matter of an action and that the petition does not state a cause of action are not waived by answer or stipulation, and may be asserted for the first time as late as motion for rehearing in the Supreme Court. Jurisdiction over the subject matter cannot be conferred by consent of parties.

Sec. 25-808 (1943) R. S."

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Carlson *v.* Bartels, 143 Neb. 680, 10 N. W. (2d) 671;

Schmidt *v.* Henderson, consolidated with Schmidt *v.* Neville, 148 Neb. 343, 27 N. W. (2d) 396;

Villa *v.* Grand Island Elec. Lt. Co., 68 Neb. 222, 97 N. W. 613;

Stewart *v.* Herten, 125 Neb. 210, 249 N. W. 552.

"XV. A cause of action created by statute does not survive unless declared so to do by the statute itself or by provision for its survival made by some other statute.

Samson *v.* Neuman, 142 Neb. 556, 7 N. W. (2d) 60.

"XVI. It is fundamental that when a party to a pending suit dies and the cause of action in such suit

is one which dies with the person, the suit abates and cannot be revived.

Samson *v.* Neuman, supra;
1 Am. Jur. 105.

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"XVII. A fortiori, when no action has been instituted before the death of the party, no suit may be begun nor maintained.

Samson *v.* Neuman, supra;
Moon *v.* Bullock, 151 Pac. (2) 765.

"XVIII. The personal representatives of a deceased party to a suit cannot prosecute or defend a suit after his death, unless the cause of action on account of which the suit is brought is one that survives by law.

Samson *v.* Neuman, supra.

"XIX. Actio personalis moritur cum persona, or personal cause of action does not survive.

Samson *v.* Neuman, supra;
1 C. J. p. 153, No. 248;
1 R. C. L. pp. 20-21, No. 11;
1 Am. Juris, p. 67-68, No. 76; p. 76, No. 95; p. 92, No. 133;
DeLatorre *vs.* Johnson (Calif.), 254 Pac. 1105.

"XX. Statutes in pari materia governing the abatement of actions and survival of causes of action in Nebraska must be construed together. Decisions prior to the decision in Samson *v.* Neuman, supra, which interpreted Nebraska abatement and survival law by ignoring certain statutes in pari materia, are erroneous.

Samson *v.* Neuman, supra;
Sections 25-322; 25-1401; 25-1402; 25-1410; 48-118, R. S. Nebr. 1943.

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"XXI. A petition disclosing that an alleged tort-feasor is dead, and that the plaintiff is suing in the action the personal representative of the alleged tort-feasor for personal injuries alleged to have been sustained by reason of negligence of the deceased tort-feasor, DOES NOT STATE A CAUSE OF ACTION.

McLellan *v.* Automobile Ins. Co., 80 Fed. (2d) 344;
Friedman *v.* Greenberg, 110 N. J. L. 462, 87 A. L. R. 849;
Moon *v.* Bullock, 151 Pac. (2) 765.

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"XXIV. When a suit involves a cause of action which does not survive and one of the parties is the personal representative of a deceased alleged tort-feasor, THERE IS NO SUBJECT MATTER UPON WHICH THE COURT COULD EXERCISE JURISDICTION, and it would act, if it acted at all, without jurisdiction.

Johnson *v.* Frank, 191 S. W. (2d) 618;
People *v.* Taylor, 342 Ill. 88, 174 N. E. 59;
State ex rel Case *v.* Superior Court, 23 Wash. (2d) 250;
Blodgett *v.* Greenfield, 281 Pac. 694;
Moon *v.* Bullock, 151 Pac. (2) 765.

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"XXV. The meaning of a Constitution is fixed when it is adopted. It is not different at any subsequent time when a court has occasion to pass upon it.

First Trust Co. *v.* Smith, 134 Neb. 84, 277 N. W. 762.

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"XXVI. In the interpretation of the Bill of Rights, the court will consider its history, the development of the evil sought to be restrained by its provisions, the

established laws, usages and customs of the country at the time of its adoption and the scope of the remedy its terms imply.

First Trust Co. *v.* Smith, supra.

"XXVII. In the absence of expressed contrary intention, the adoption of statutory or constitutional provisions from another state accepts the meaning of such adopted provision that it carried in the context of which it originally formed a part, and, if it had been previously construed by the courts of such state, the judicial determination thus made.

First Trust Co. *v.* Smith, supra.

"XXVIII. In adopting Sec. 9, Art. I of the Nebraska Constitution in 1866 and its readoption as Sec. 13, Art. I of Constitution of 1875, by the electorate of the state, the then settled judicial interpretation and meaning of those clauses were also adopted.

First Trust Co. *v.* Smith, supra.

"XXIX. Sec. 13, Art. I retains its original virility and constitutes present binding limitations on the exercise of judicial power.

First Trust Co. *v.* Smith, supra.

"XXX. A court is not at liberty to construe into the Constitution new principles which did not exist at the time of its adoption.

First Trust Co. *v.* Smith, supra;
Moon *v.* Bullock, 151 Pac. (2) 765.

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"XXXI. A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced.

Cooley, Constitutional Law.

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"XXXII. To the extent that the constitutional provisions declaratory of individual rights are lacking in means by which they may be enforced, they are not self-executing. Provisions guaranteeing that every person injured shall have an adequate remedy by law gives no additional remedies for injuries suffered, until such remedies are provided by the legislature.

12 C. J. page 733;
State *v.* Dubuclet, 28 La. Ann. 698;
Henry *v.* Cherry, 30 E. I. 13, 73 Atl. 97;
Moon *v.* Bullock, 151 Pac. (2) 765.

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"Argument. *Assignment of Error I.*—The Court erred in overruling motion of defendant, Arthur Bingaman, administrator (T. 46), for an order vacating and setting aside the verdict rendered herein and the judgment entered thereon and dismissing the action, said motion being for the following reasons:

(A)—That this Court does not now have and never did have jurisdiction of the subject matter of this action.

(B)—That the purported verdict rendered herein and the judgment entered thereon is now and was at all times void."

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" 'Where the court has no jurisdiction, over the subject matter of the action, all proceedings in such action are void.'

"In brief, the rule is that jurisdiction of the subject matter cannot be conferred in these cases upon or in the district court of this county by filing an answer, by waiver, or by consent of the parties, and the question of jurisdiction can be raised and noted by the court on its motion at any time, and jurisdiction over the subject matter may be raised at any time even in the Supreme Court. Where there is no jurisdiction, any and all proceedings are void.

"Objections that court does not have jurisdiction of the subject matter of an action and that the petition does not state a cause of action are not waived by answer or stipulation, and may be asserted for the first time as late as motion for rehearing in the Supreme Court. Jurisdiction over the subject matter cannot be conferred by consent of parties.

"Section 25-808 (1943 Stats. Neb.) provides:

'Objections to Petition by Answer—Objections: When Waiver—When any of the defects enumerated in Section 25-806 do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived same, EXCEPT ONLY THE OBJECTION TO THE JURISDICTION OF THE COURT, and that the petition does not state facts sufficient to constitute a cause of action.'"

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"In Villa, et al *v.* Grand Island Electric Light Co., 68 Neb. 922, 97 N. W. 613, the Nebraska Supreme Court said:

'The question of whether a petition states a cause of action may be raised at any stage of the proceedings in the appellate court, up to and including the filing of a motion for rehearing.'"

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"District Court Was Without Jurisdiction of Subject Matter Because No Cause of Action for Personal Injuries Survives the Death of an Alleged Tort-Feasor.

"When a suit for personal injuries involves a cause of action which does not survive and one of the parties is the personal representative of a deceased alleged tort-feasor, THERE IS NO SUBJECT MATTER UPON WHICH THE COURT CAN EXERCISE

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JURISDICTION, and it would act, if it acted at all, without jurisdiction.

"In Johnson v. Frank, 191 S. W. (2d) 618, the Supreme Court of Missouri said:

> " 'Where cause of action abated on defendant's death, court had no jurisdiction of the subject matter, and such jurisdiction could not be waived or conferred by consent of executor of decedent's estate, as by entry of general appearance.
>
> 'In so far as respondent Archer K. Frank, executor, is concerned, it is wholly immaterial whether he entered his general appearance or not because the cause having abated upon the death of defendant Walton C. Frank, the court had no jurisdiction of the subject matter of the action and such jurisdiction could not be waived or conferred by consent. State *v.* Lambert, 154 S.W. (2d) 990; Cape Girardeau County *v.* Harbison, 58 Mo. 90; Madison County Bank *v.* Suman's Admr., 79 Mo. 527; Bambrick *v.* Bambrick, 157 Mo. 423, 58 S.W. 8; Bank of Skidmore *v.* Bartram, 142 S. W. (2d) 657.'

"In the case of People *v.* Taylor, 342 Ill. 88, 174 N.E. 59, the Supreme Court of Illinois holds that abatement extinguishes the jurisdiction of the court, and states the rule as follows:

> 'Second, the petition shows that it sufficiently appeared in the election contest proceedings prior to the entry of the judgment here sought to be expunged

> that Joyce had died, and if this abated the proceedings, as we hold it did, the order entered by the respondent was void, for the reason that the circuit court, in which respondent was sitting at the time of the entry of the judgment here attacked was without jurisdiction of the subject matter.

'The only order that could *could* have then entered in the cause was one dismissing the petition because the action had abated. Abatement of the suit of proceeding extinguishes jurisdiction in the court of the subject matter, and whether the court entered an order indicating the cause had abated or not, the cause was none the less abated by the death of Joyce.' "

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"Statutes in pari materia governing the abatement of actions and survival of causes of action in Nebraska must be construed together. Opinions prior to the decision in Samson *vs.* Neumann, supra, which prior opinions interpreted Nebraska abatement and survival law by ignoring certain statutes in pari materia, are erroneous.

"A cause of action created by statute does not survive unless declared so to do by the statute itself or by provisions for its survival made by some other statute.

"It is fundamental that when a party to a pending suit dies and the cause of action in such suit is one which dies with the person, the suit abates and cannot be revived.

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"A fortiori, when no action has been instituted before the death of the party, no action may be begun nor maintained.

"The personal representatives of a deceased party to a suit cannot prosecute or defend a suit after his death, unless the cause of action on account of which the suit is brought is one that survives by law.

"Actio personalis moritur cum persona, or a personal cause of action does not survive."

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"The cause of action in the Samson case was purely personal.

"A cause of action for injuries to the person is purely personal.

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"The Supreme Court said in the Neumann case that there was no statute in Nebraska providing for the survival of an action which is purely personal. In the Wilfong, 129 Neb. 600, case, the court evaded the fact that there was no statute providing for survival of personal causes of action, by saying that the common law maxim, 'actio personalis moritur cum persona,' never was a part of the common law of Nebraska (because all Nebraska actions for damages are purely compensatory but not punitive); but the maxim was a part of the law of Nebraska at the time of the Samson decision, and therefore, in effect at the time of the Wilfong and Grainger decisions.

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"There was nothing punitive about the claim of the widow for a widow's allowance.

"It is true that the decision in the Wilfong case asserts only that Section 9, Art. I of the Constitution of 1867 invalidated the maxim, 'Actio personalis,' etc. so far as personal injuries were concerned. Appellant contends, however, that the Constitution of 1867 did not invalidate the maxim in any respect. He points to Nebraska legal history to sustain that contention. If, as claimed, the maxim was invalidated so far as personal injuries were concerned, why was its alleged invalidation ignored in the cases of Webster *v.* City of Hastings (1900), Murray *v.* Omaha Transfer Co. (1914), Levin *v.* Musser (1921), in Re Grainger's Estate (1931), (even as late as 1931, no one had called the attention of the Supreme Court to the fact that the maxim had been invalidated for some sixty years)—all personal injury actions—why was its alleged invalidation ignored, and the survival of the actions based on the provisions of the now Section 25-1402—plus, in the Grainger case, a constitutional provision, it is true, but not Sec. 9, Art. I, but the *equal protection of the laws clause?* Particularly unexplainable, this reliance on the provisions of 25-1402 and this disregard of the alleged invalidation of 1867, in view of the fact

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that laws in pari materia with 25-1402 could not be considered if the survival of actions for personal injuries were to be established."

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"Section 49-101 of the Revised Statutes of 1943 is as follows:

> 'So much of the common law of England as is applicable and not *inconsistent with the Constitution of the United States,* with the organic law of this State, or with any law passed or to be passed by the Legislature of this State, is adopted and declared to be law within the State of Nebraska.'

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"Also American Jurisprudence, Vol. 1, pp. 67 and 68, § 76:

> 'At common law, personal rights of action die with the person. This principle is expressed in the maxim, "Actio personalis moritur cum persona" The rule expressed in this maxim applies whether the death from an injury is instantanous or not.'

"There is no Nebraska case holding that in a case, like the one at bar, where the alleged tort-feasor was instantly killed nor any case involving Sec. 48-118 (1943) R.S. that a cause of action survived.

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"In Re Grainger's Estate, supra, the facts were that a Miss Ward received personal injuries as a result of Grainger driving a car, Grainger survived the accident ten days. After his death, Miss Ward instituted suit and Dean, J., in the opinion, held that she could maintain her action.

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"Part of the reasoning in the Grainger case was based on the following statement by Judge Dean:

'We have held that a pending action for personal injuries does not abate by the death of the injured person, but may be revived by the decedent's personal representatives • • • But there has not been a decision pointed out bearing directly on the facts herein, nor do we know of any in this state. The claimant argues that it is not an *equal protection of laws* to deny to her the right of recovery against the decedent's estate when, under our decisions, as noted above, the right to recover from a living tortfeasor has been granted to a dead person's estate.'

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"The foregoing statement was based on the cases of Webster *v.* City of Hastings, Murray *v.* Omaha Transfer and Levin v. Muser. Those cases were based on an interpretation of what is now Section 25-1402 reading as follows:

'ACTIONS WHICH ABATE BY DEATH OF DEFENDANT. No action pending in any court shall abate by the death of either or both of the parties thereto, except in actions for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance or against a justice of the peace, for misconduct in office; which shall abate by the death of the defendant.'

"In other words, up to the time of the Grainger decision, the Supreme Court interpreted the foregoing Section 25-1402 as interpreted in the foregoing cases, to mean that every pending action survived except those for libel, slander, malicious prosecution, etc., regardless of whether the cause of action would have survived if no suit had been pending.

"In this connection we quote Section 25-1401, R. S. 1943:

> *'CAUSES OF ACTION WHICH SURVIVE.* In addition to the causes of action which survive at common law, causes of action for mesne profits or for an injury to real or personal estate, or for deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same.'

"Our Supreme Court in the Grainger cases, therefore, reasons that if Nebraska permitted the revival of a pending action for personal injuries, and that it did not abate by the death of the injured person, and could be revived by the decedent's personal representative, then, in what Judge Dean designates as *equal protection of the laws*, the *Court* in the Grainger case should hold that the cause of action did not abate by the death of the tort-feasor.

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"The Nebraska Supreme Court was wrong in its earlier interpretation of Section 25-1402, and said so, in the case of Samson *v.* Neumann, Executor, 142 Neb. 556, 12 S.C.J. 111, 7 N.W. (2d) 60.

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"In the Samson case an action was pending by the widow for a widow's allowance, when she died. Neumann, Executor, filed a pleading in abatement alleging that the claimed right to a widow's allowance had fully and completely abated and become extinguished by reason of her death, and objected to any order of revivor, and to the further continuance of the case in any respect whatsoever, and praying that the application for revivor be denied.

"The trial court apparently followed the line of reasoning in the early Nebraska cases in interpreting Section 20-1402 and held inasmuch as the action for widow's allowance did not come within the exceptions of libel,

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slander, malicious prosecution, assault, etc. that the claim for widow's allowance did not abate by the death of the widow.

"The Supreme Court held as follows:

'In the first place, all statutes in pari materia should be studied together, and, in addition to section 25-1402, R.S. 1943, 20-1402, R.S. 1929 • • • Section 20-322 R.S. 1929, 25-322, R.S. 1943, should be considered. Sec. 25-322 provides that an action does not abate by the death or other disability of a party or by the transfer of any interest therein during its pendency, if the cause of action survive or continue.'

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"And, further:

'These sections require an investigation as to when causes of action survive, and there is a distinction between the use of the word "abatement" in common law, where it means an entire overthrow or destruction of a suit, and in equity courts, where abatement may indicate rather a temporary suspension of further proceeding in the suit because of want of proper parties.

'The question for determination is whether this action survived the death of the plaintiff. The well known common law rule, actio personalis moritur cum persona, is invoked by the respondents, which presents two questions for our determination; first, was the claim presented by the plaintiff personal in its nature; and, second, if it was personal did it survive the death of the plaintiff?'

"The Nebraska Supreme Court held that where a cause of action does not survive the death of a party Section 25-1402 has no application.

"It will thus be seen that Section 25-1402 does not help any cause of action which did not survive at common law or by reason of some statutory provision. Our Supreme Court held in the Samson case that the

cause of action was personal, and did not survive the death of the widow.

"This interpretation was directly contrary and opposite to the earlier Nebraska cases of Webster *v.* City of Hastings, Murray *v.* Omaha Transfer and Levin *v.* Muser cited in the Grainger case, and therefore overruled those cases. It therefore follows that when this Court overruled the cases on which Judge Dean relied in the Grainger case then the Grainger case must also fall.

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"Before passing the Grainger case, we wish to call attention to citations in the Grainger case of Brown *v.* C. & N.W. 102 Wis. 133, 77 N.W. 748, 78 N.W. 771, and Harris *v.* Nashville Trust Company, 128 Tenn. 573, 162 S.W. 584, in which the Court states there appears to be a noticeable diversion from the common law rule. The Grainger case goes on to say, 'It has been held that the cause of action does not abate with the death of the person injured, and that such injured person's estate or surviving relatives may recover from the wrongdoer for damages sustained by his death.

"Our Supreme Court in the Grainger case overlooked the fact that the common law rule in Wisconsin had been modified by a statute reading as follows:

> 'In addition to the actions which survived the common law, the following actions shall also survive, that is to say: actions for * * *, assault and battery or false imprisonment, or other damage to the person.* * *'

"Since there is no Nebraska statute comparable to the Wisconsin statute, it follows that the case of Brown *v.* C. &. N. W. is not in point, and certainly did not hold what it was stated to hold in the Grainger case.

"Of the other case, a Tennessee case, Harris *v.* Nashville Trust, supra, the Supreme Court of Tennessee

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said in Brown *v.* Stephens, Mitchell *v.* same (2 cases), 52 S.W. (2d) 146, as follows:

'It is suggested in argument that Harris *v.* Trust Co. 128 Tenn. 573, 162 S.W. 584, 586, 49 L.R.A. (N.S.) 897, Ann. Cas. 19140, 885, tends to establish a rule, contrary to the weight of our decisions, to the effect that the cause of action survives at common law. The court in that case did not so hold. The right of action in that case, which was a suit for publica-

tion by probate of a libel contained in a will, did not accrue until the publication of the libel after the death of Woodfin, and it was directly stated that the "right of action arose after Woodfin's death, and could not have been buried with him." In the instant case the alleged tort was committed before the death of Lisenbury. The ruling in the Harris case has no application to the present case. Beginning with Griffith *v.* Beasly, 10 Yerg. 434, and followed in Cherry *v.* Hardin, 4 Heisk, 199; Driver *v.* Arn and Carn, 6 Tenn. Civ. App. 589; Whaley *v.* Catlett, 103 Tenn. 347, 53 S. W. 131; Wilson *v.* Barton, 153 Tenn. 250, 283 S.W. 71, this court has uniformly held that an action ex delicto dies with the wrong-doer.'

"In brief, the Supreme Court of Tennessee said that Harris *v.* Nashville was not an authority for the doctrine that was ascribed to it in the Grainger case. *The Grainger case must fall* because our Supreme Court has overruled the Nebraska cases cited therein, as is set forth in the Samson case, and by holding that Section 25-322 must be construed with Section 25-1402; and by further fact that the Wisconsin case was based on statute, and the Supreme Court of Tennessee said that the case of Harris *v.* Nashville Trust was not an authority for holding that a cause of action for injuries growing out of an automobile accident survived the deat- of the alleged tort-feasor."

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"The meaning of a Constitution is fixed when it is adopted. It is not different at any subsequent time when a court has occasion to pass upon it.

"In the interpretation of the Bill of Rights, the court will consider its history, the development of the evil sought to be restrained by its provisions, THE ESTABLISHED LAWS, USAGES AND CUSTOMS OF THE COUNTRY AT THE TIME OF ITS ADOPTION, and the scope of the remedy its terms imply.

"In the absence of expressed contrary intention, the adoption of statutory or constitutional provision from another state accepts the meaning of such adopted provision that it carried in the context of which it originally formed a part, and, if it had been previously construed by the courts of such state, the judicial determination thus made.

"In adopting Sec. 9, Art. I of the Nebraska Constitution in 1866 and its readoption as Sec. 13, Art. I of the Constitution of 1875, by the electorate of the state, the then settled judicial interpretation and meaning of those clauses was also adopted.

"Sec. 13, Art. I retains its original virility and constitutes present binding limitations on the exercise of judicial power.

"A court is not at liberty to construe into the Constitution new principles which did not exist at the time of its adoption.

"A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced.

"To the extent that the constitutional provisions declaratory of individual rights are lacking in means by which they may be enforced, they are not self-executing. Provisions guaranteeing that every person injured shall have an adequate remedy by law give no additional remedies for injuries suffered, until such remedies are provided by the legislature.

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"The next case to be considered is the Wilfong case, Wilfong *v.* O. & C. B. St. Ry. Co., 129 Neb. 600, 262 N. W. 537. This involved two causes of action, one for pain and suffering before death and second, wrongful death. Of course, the wrongful death cause of action was properly maintainable against the street-car company by virtue of the Lord Campbell Act. The Supreme Court rejected the contention that a cause of action for pain and suffering did not survive the death of the injured person for the reason, it was said, that our Constitution accorded a remedy for every wrong, and that the Constitutional provision is self-executing. This rule was based in part on an assertion in the Florida case of Waller *v.* First Savings & Trust Company, 138 So. 780, in connection with which our Court said as follows:

> '* * *, in construing a provision of the Florida Constitution identical with our own the language of Davis, J., in the majority opinion sets forth reason fully sustaining the conclusion herein announced. He says, in part: "The *reason* for the English law rule to the contrary was that a tort action died with the tortfeasor because a tort action was regarded as punitive in character, all of which has been changed in Florida by the intendment of our Declaration of Rights which recognizes not only the punitive nature of a tortious wrong-done, but also recognizes and preserves in organic language a legal 'remedy' for that wrong, and provides that the courts shall always be open to afford it.' "

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"Later, however, the Supreme Court of Florida in State *v.* Parks, 175 Southern 786, held that the right to maintain the action of Waller *v.* First Savings & Trust Company (see also the concurring opinion) was based

on Section 4211 of the Florida Statute, providing as follows:

> '4211. Suits for Personal Injuries.—All actions for personal injuries shall die with the person, to wit: Assault and battery, slander, false imprisonment, and malicious prosecution; all other actions may be maintained in the name of the representatives of the deceased.'

"And the Supreme Court of Florida said further:

> 'If the plaintiff has a right to maintain this action, it must be done by virtue of some statutory enactment, as a right to recover for personal injuries at common law died with the person. It will be observed that the Legislature of Florida changed the common law as applied to personal injuries by the enactment of Section 4211 of the Compiled General Laws of Florida.'

"In other words, the later Florida cases hold that the Florida statute No. 4211, was the authority for maintaining the action. An action at common law would have died with the death of either party. No reliance whatever, in the later case, was had on the constitutional provision.

"Our Court in the Wilfong case referred to the self-executing rule as applied to constitutional provisions in 12 C. J. 729 (a.b.c.), but our Court overlooked the applicable rule, 12 C. J. 733, which appears under subdivision c:

> 'But to the extent that constitutional provisions declaratory of individual rights are lacking in the means by which they may be enforced, they are not self-executing.'

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"Thus provisions guaranteeing that every person injured, says subdivision c, 'shall have an adequate remedy at law, give no remedies for injuries suffered

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until such remedies are provided by the Legislatiure,' citing Henry *v.* Cherry, 30 R.I. 13, 73 Atl. 97, 136 Am. St. Reps. 938, 24 L.R.A. (N.S.) 991, 18 Annotated Cases 1006.

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"At the time the statutes and provisions of the Nebraska constitution were adopted in Nebraska—it was the universal rule in all the states from whose constitutions and statutes the provisions involved in the Wilfong case, the Grainger case and this case—might have been borrowed—it was the universal rule that the maxim, 'actio personalis moritur cum persona,' rigidly applied to all personal injury actions.

"And we might say, that in all the states, except in those states which have modified the maxim by statutory enactment, the maxim is still in force.

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"Nebraska was admitted to the Union on February 9, 1867. Its Constitution on that date contained sec. 9, Art. No. 1, providing:

> 'All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law and justice administered without demand or delay.'

"NEBRASKA'S FIRST WRONGFUL DEATH ACT took effect on May 1, 1873, SEVEN YEARS AFTER THE AFORESAID sec. 9, art. No. 1, went

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into operation. The language in that section (9, Art. No. 1) was not broad enough to give a remedy for the worst injury—DEATH. And the Supreme Court of Nebraska HAS RECOGNIZED THE REMEDY FOR WRONGFUL DEATH HAS ITS SOURCE—NOT IN THE CONSTITUTION—but in the Wrongful Death

Act. In Luckey *v.* Union Pacific R. Co., 219 N.W. 802, 117 Neb. 85, the Supreme Court said:

> 'Civil remedy by action against one cause death IS CREATURE OF STATUTE.'

"That statement in the Luckey case is but a repetition of a pronouncement which has been made by the highest court of nearly every state in the Union. And they have been made in the states which contain in constitutions language like sec. 9, art. No. 1.

"In First Trust Company *v.* Smith, supra, the Supreme Court laid down the following rule:

> 'In the absence of expressed contrary intention, the adoption of a statutory or constitutional provision from another state accepts the meaning of such meaning of such adopted provision that it carried in the context of which it originally formed a part, and if it had been previously construed by the courts of such state, the judicial determination thus made.'

Applying the above rule, it may be said that in *all* the constitutions of all the states from which the State of Nebraska might have adopted the provision contained in Sec. 9, Art. I, Const. 1867, all of these states at that time, without exception, followed the rule, 'actio personalis moritur cum persona' (a personal action dies with the person). The 1885 edition of Bouvier's Law Dictionary, 17 years after the Nebraska Constitution was adopted, in discussing the applicability of the maxim to personal injuries, says:

> 'In cases of injuries to the person, * * * if either party who received or he who committed the injury die, the maxim applies rigidly, and no action at common law can be supported either by or against the executors or other personal representatives. But in one respect this rule has been materially modified in England by Lord Campbell's Act, and in this coun-

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try by enactments of similar purport in many of the states.'

"Now, Nebraska, in 1873, adopted a 'wrongful death' statute, and it would thus appear that the Nebraska legislators were NOT relying on the 'remedy for every injury' provision of the Constitution.

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"Counsel cites two cases which it might be conceded hold directly contrary to the conclusion reached by me by the foregoing process of reasoning: *Waller v. First Sav. & Trust Co., (103) Fla. (1025), 138 So. 780; In re Estate of Grainger, (121) Neb. (338),* 237 N.W. 153, 78 A.L.R. 597.

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"(6) 'And, apparently, the court accepts the argument made by claimant (plaintiff) *"That it is not an equal protection of the law to* deny to her the right of recovery against decedent's estate when under our decisions, as noted above, the right to recover from a living tort-feasor has been granted to a dead person's estate." *Conceding that the argument is good under Nebraska law,* it is not so in Idaho, for here no right of action is given to the estate of the victim of tort, but is granted only to his heirs, and then only if the cause of his death was the wrongful act of the tort-feasor. If there are no heirs, no right of action vests in anybody. Whitley *v.* Spokane, etc. Ry. Co., supra; see also Tuttle *v.* Short, (42), Wyo. (1), 288 P. (524), (529), (70 A.L.R. 106).

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"These decisions" (Waller and Grainger), says the Harvard Law Review, "have allowed survival of certain causes by what amounts to judicial legislation. The Nebraska decision creates uncertainty as to the status of other causes not within the survival statutes." 48 Harvard Law Review, 1008.

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"SUMMARY

II

The maxim 'actio personalis moritur cum persona' is in effect in Nebraska, having been established by Samson *v.* Neumann, supra, which overruled the Grainger case and the Wilfong case; Samson *v.* Neumann held

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that Section 25-1402, R. S. Nebraska, 1943, must be construed with Section 25-322, R. S. Nebraska, 1943, and held that the only cases which could be revived were those that survived at common law or by virtue of some statute. If this case which did not survive at common law could not have been revived under sections 25-1402 and 25-322, if it had actually been pending, a fortiori, it could not have been instituted under Section 25-1401.

"Samson *v.* Neumann overruled Webster *v.* City of Hastings, Levin *v.* Musser and Murray *v.* Omaha Transfer Company, the three Nebraska cases cited in the Grainger case. The Wisconsin case cited in the Grainger case was based on an express provision of the Wisconsin statute, and the Supreme Court of Tennessee expressly repudiated the meaning of a Tennessee opinion attempted to be ascribed to it in the Grainger case.

"The Wilfong case was overruled by the case of First Trust Company *v.* Smith, supra, and Samson *v.* Neumann, supra.

III

"The petition did not state a cause of action for the reason it discloses that Arthur Bingaman, Administrator of the Estate of Alvin A. Bingaman, deceased, was the defendant, and the maxim 'actio personalis moritur cum persona' was applicable."

After the rendition of the opinion of April 14, 1949, in which the Supreme Court of Nebraska decided adversely to

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appellant Bingaman the question of whether or not any cause of action survived the death of Alvin A. Bingaman, appellant Bingaman filed a motion for rehearing and brief in support thereof, in which he reiterated his prior position on the constitutional features of the case, and, in addition, set out in detail the basis of his position.

Following are excerpts from the motion and brief:

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"Motion for Rehearing

"Comes now appellant, Arthur Bingaman, administrator, and moves the Court for a rehearing, and for an order granting him a rehearing in the above entitled case only insofar as said opinion deals with the matters

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involved in syllabi 1, that part of 6 holding the cause of action survives, 7, and 8, for the following reasons and each of them.

1. Under the common law a personal cause of action does not survive.

2. The cause of action sued on herein is a personal cause of action and did not survive the death of Alvin A. Bingaman.

3. Section 49-101, R.S. Neb. 1943, provides that so much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic laws of this state, or with any law passed or to be passed by the Legislature of this State, was adopted and declared to be law within the State of Nebraska.

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7. Section 1, Amendment XIV, Constitution of the United States, is part of the organic law of the State of Nebraska, and any constitutional, statutory or com-

mon law of the State of Nebraska in conflict therewith must yield to the provisions of that amendment.

8. Inherent in the adoption of so much of the common law of England (See Sec. 49-101, R.S. 1943) 'as is applicable and not inconsistent with the Constitution of the United States * * *' was the corollary that no part of the common law of England could be repealed as 'inapplicable,' or as unsuited to modern conditions, if such repeal rendered the common law of Nebraska in conflict with the Constitution of the United States.

9. The Constitution of the United States confers upon no individual the right to demand action by the State which results in the denial of *equal protection of the law to other individuals.* Miss Ward, the plaintiff in the Grainger case, had no right to demand, from

the Courts of this State, under a plea that she was entitled to comparable rights to those received by plaintiffs in prior personal injury actions—abrogation of a part of the common law—when such abrogation resulted in the denial, to the personal representative of Grainger, of equal protection of the laws.

10. Appellant Bingaman, in County Court, and in the District Court, where this action originated—raised the question of Rehn's right to maintain this action—by challenging the Grainger opinion's approval of Miss Ward's argument in support of her demand for '*equal protection of the laws.*' Sec. 1, Amendment XIV, was at all times involved.

11. Section 1, Amendment XIV, Constitution of the United States is self-executing.

12. Section 48-118 (R.S. 1943) is repugnant to Section 1, Amendment XIV, Constitution of the United States, in that the common law as to survival of causes of action for personal injuries, which the Court says

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Section 48-118 preserves, deprives appellant Bingaman of the privileges and immunities, and denies him due process of law and equal protection of the laws, given by the constitutional amendment.

13. Section 49-101 (R.S. 1943) is repugnant to Section 1, Amendment XIV, Constitution of the United States, in that the common law of England adopted by

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virtue of the above section of the statutes deprives appellant Bingaman of the privileges and immunities, and denies him the due process of law and the equal protection of the laws, given by the said constitutional amendment."

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"Statement of Questions Involved

"There is involved in this motion herein the following principal questions:

1. What part of the common law is in force in Nebraska?

2. Does a personal cause of action survive under Nebraska common law?

3. Under Nebraska Statute 25-1401 what causes of action at common law are contemplated?

4. Are Nebraska Constitutional provisions concerning individual rights self-executing?

5. Is appellant Bingaman entitled to the protection of Sec. 1, Amend. XIV, Constitution of the United States, which forbids abridgment of a citizen's privileges and immunities and the denial of due process of law and of the equal protection of the laws?

6. In Section 13, Art. I, Constitution, Nebraska, in conflict with Sec. 1, Amend. XIV, Constitution of the United States?

7. Does the enforcement of the State's common law in the case at bar deprive appellant Bingaman of the

privileges, immunities and rights to which he is entitled by virtue of Section 1, Amendment XIV, Constitution of the United States?"

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"Propositions of Law

I

"In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought,

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notwithstanding the death of the person entitled to or liable for the same.

Section 25-1401, R.S. Neb. 1943.

II

"So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this State, or with any law passed or to be passed by the Legislature of this State, is adopted and declared to be law within the State of Nebraska.

Section 49-101, R.S. Neb. 1943.

III

"If the common law is inadequate, the proper course is by legislation.

Wilson *v.* Bumstead, 12 Neb. 1, 10 N.W. 411.

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IV

"The action involved in this case is a personal cause of action, it did not survive at common law, and there is

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no provision in any Nebraska statute, or in the Constitution, providing for its survival.

Samson *v.* Neumann, 142 Neb. 556, 7 N.W. (2d) 60, 144 A.L.R. 264.

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VIII

"The court is not at liberty to construe into the Constitution new principles which did not exist at the time of its adoption.

First Trust Company *v.* Smith, 134 Neb. 84, 277 N.W. 762.

IX

"The meaning of a Constitution is fixed when it is adopted. It is not different at any subsequent time when the Court has occasion to pass upon it.

First Trust Company *v.* Smith, supra.

X

"The dicta in the Waller case, 138 So. 780 (Fla.) was repudiated by the Supreme Court of Florida in Cason *v.* Baskin, 155 Fla. 198, and other Florida cases. In Florida the right of action for personal injury against a deceased tort-feasor is given by the Section 45.11, F.S.A. See Necker *v.* Gallinger (1948), 35 So. (2) 647.

XI

"If Section 13, Article I, Nebraska Constitution, is held to be self-executing in the case at bar, then it is in conflict with the provisions of Section 1, Amendment XIV, Constitution of the United States '* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

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States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws,' in that the aforesaid provision of the Nebraska Constitution deprives appellant Bingaman of the right of immunity from suit he had by virtue of the common law, but does not deprive the personal representatives of other alleged wrong-doers (personal representatives of any alleged wrong-doers charged with having caused the wrongful death of others) of their right of immunity from suit, because our Court has held the action for wrongful death is wholly statutory, and that no right exists under a statute unless provided for therein. There is no provision in the Nebraska Wrongful Death Act for the survival of the cause of action created by such act against the personal representative of a wrong-doer.

XII

"Section 48-118 (R. S. 1943) and Section 49-101 as construed are repugnant to Section 1, Amendment XIV, Constitution of the United States, and therefore invalid.

Sec. 1, Amend. XIV, Const. of U. S.

Sheeley *v.* Kraemer, 68 S. Ct. 836.

XIII

"Section 1, Amendment XIV, United States Constitution, is prohibitory and, therefore, self-executing.

12 C.J. 731.

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XIV

"State judicial action is not immunized from operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common law policy.

Sheeley *v.* Kraemer, 67 S. Ct. 836.

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XV

"The Constitution confers on no individual the right to demand action by the State which results in denial

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of equal protection of laws to other individuals.
Sheeley *v.* Kraemer, supra.

"Any enactment, to which a State gives the force of law, whether it has gone through the usual state of legislative proceedings, or been adopted in other modes of expressing the will of the State, is a statute of the State within the meaning of Section 2, Paragraph 1257, Chapter 81, Part IV, Title 28, United States Code—and Section 13, Article I, Constitution of the State of Nebraska, is a statute within the meaning of said section.

Stevens *v.* Griffith, 111 United States Reports, 50.
Hamilton *v.* Regents of the University of California, 55 S. Ct. 197, 293 U. S. 245."

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"Constitutional Guarantee of Equal Rights Should Be Extended to Appellant Bingaman.

"If the doctrine of the constitutional guarantee of equal rights, as announced in the Grainger case is still valid—appellant Bingaman respectfully requests this Court to extend the protection of the guarantee to him.

"Since Nebraska law does not permit the personal representative of a deceased alleged tort-feasor to be sued for the wrongful death of another—then, under the doctrine of equal rights, as announced in the Grainger case, Nebraska law does not pemit the personal representative of a deceased alleged tort-feasor to be sued by a living injured person.

"The action of this Court, in its opinion of April 14, 1949, in holding that a cause of action for personal injuries survived the death of the alleged tort-feasor, appellant respectfully submits, violates Section 1 of Amendment XIV of the Constitution of the United States, as follows:

"Sec. 1, Amendment XIV, provides in part, that:
• • •

'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"The Supreme Court of Nebraska has held that an action for wrongful death is purely statutory, and that were it not for Section 30-809 (1943) R. S. no action for wrongful death could be maintained. The same court has held that where a cause of action is created by statute, and such action did not exist at common law, such cause of action does not survive, unless the statute which created the caust of action provides for such survival. The right of action for wrongful death did not exist at common law, and the Nebraska wrongful death statute does not provide for an action for wrongful death against the personal representative of a deceased tort-feasor. The opinion of April 14, 1949 held that the personal representative of an alleged tort-feasor could be sued by a living injured party. Appellant respectfully submits that that holding abridges his privileges and immunities, and denies to him the equal protection of the laws, and due process of law, contrary to the provisions of the United States Constitution above quoted, in that Nebraska law permits a suit to be maintained against Arthur Bingaman as administrator of the estate of his deceased brother, Alvin A. Bingaman, by a living

injured person, and denies to said administrator the immunity from suit enjoyed by the personal representative of one charged with the wrongful death of another—the personal representative of one whose death was due to the wrongful act of another cannot maintain an action for such wrongful death against the personal representative of the wrong-doer.

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"Appellant has heretofore, in detail, outlined his contentions that Nebraska constitutional, statutory and common law, as applied in the Grainger case, the Wilfong case and in the case at bar, are repugnant to Section 1, Amendment XIV.

"Solution of the problem, in appellant's opinion, is contained in the case of Shelley *v.* Kraemer, 68 S. Ct. 836, wherein it was stated:

'The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals.''

Appellant Bingaman contends that no objection should be made to the consideration of the matter set out in his motion for rehearing and brief in support thereof, and his contention has two bases, as follows:

1. Appellant's motion for dismissal of Rehn's action was based on lack of jurisdiction of the subject matter and failure of Rehn's petition to state a cause of action. The Nebraska Supreme Court has repeatedly said that those objections may be raised at any time. There is no prohibition to the asertion of such objections in a motion for rehearing. A more comprehensive and detailed statement of reasons behind his objection on account of lack of jurisdiction of the subject matter and also the failure of the petition to state a cause of action was not, according to Nebraska practice, out of place in the motion for rehearing.

2—In view of the fact that in opinions rendered since the Grainger and Wilfong decisions, the Nebraska Supreme Court has expressly disapproved of suggestions that it exercise legislative powers, Appellant Bingaman was not bound to anticipate that, given the opportunity so to do, it,

the Supreme Court of Nebraska, would not overrule the Grainger and Wilfong decisions, because both of those decisions have been suspect as judicial legislation. We have here, in addition to the reason set forth in the preceding paragraph (1), a new and unexpected basis for the assertion of a federal right.

Manner in Which Validity of Nebraska State Statutes Was Brought in Question on Ground of Their Being Repugnant to the Section 1, Amendment XIV

Section 49-101 (1943 R.S. Neb. Stats.) was directly involved in both the Grainger and Wilfong decisions. Prior to the Grainger opinion, the provisions of that section, "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States," had never been construed so as to exclude from the common law of Nebraska that part of the common law of England embraced in the maxim, "Actio personalis moritur cum persona." But in the *Grainger* case, it was first suggested that the guarantee of "equal protection of the laws" of Amendment XIV could not be made effective in Nebraska if the maxim was included in Nebraska Law. It was suggested that there was a repugnancy between Amendment XIV and that portion of Nebraska Law supposed to have been adopted by Section 49-101, a contradictory and paradoxical conclusion, inasmuch as Section 49-101, by its very terms, excluded that part of the English common law "inconsistent with the Constitution of the United States." We have, therefore, before the Grainger decision, the following situation in Nebraska:

(1)—That part of the common law of England embodied in the maxim, "Actio personalis moritur cum persona," is by virtue of Section 49-101 a part of the common and STATUTORY law of Nebraska. *Statutory* because based on Section 49-101.

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(2)—There was no suggestion that that part of the common law of England embodied in the maxim, "Actio personalis moritur cum persona," was inconsistent with the Constitution of the United States.

But the suggestion was made in the *Grainger* case that a part of the English common law and a part of what prior to 1931 had been assumed to be the common and statutory law of Nebraska . . . was invalid, because such statutory and common law was repugnant to the Fourteenth Amendment. Would not the enforcement of the rule that a cause of action for personal injuries did not survive the death of the wrongdoer deprive Claimant Ward of rights which had been accorded to other litigants?

Since Section 49-101, by its very terms, did not adopt any common law inconsistent with the Constitution of the United States, it could not be held invalid as being repugnant to that constitution. If a part of the English common law was held to be excluded by 49-101 as being "inapplicable," such exclusion rendered the Nebraska law (common and statutory) repugnant to the XIV Amendment (repugnant because it deprived Grainger of its guarantees). The Nebraska Supreme Court, in the Grainger opinion, did not declare Section 49-101 invalid . . . it considered its interpretation of what that section was—to be valid.

A comprehensive and exhaustive analysis of the role of Section 49-101 and the Fourteenth Amendment in the present case, in Appellant Bingaman's opinion, will recognize that both Appellant Bingaman and Appellee Rehn have "drawn in question" the validity of Section 49-101, as being repugnant to the Amendment, it being understood, however, Appellant Bingaman is "drawing" in question a conception of 49-101 devoid of that part of the English common law embodied in the maxim, "Actio personalis

moritur cum persona." Appellee Rehn, on the other hand, "draws" in question the validity of a conception of 49-101 which adopts that part of the English common law embraced in the maxim. The Supreme Court of Nebraska holds that an interpretation of 49-101, minus the maxim, is valid.

The Fourteenth Amendment to the Constitution of the United States, did not become a part of the Constitution until July 28, 1868. Prior to that date, no assertion had ever been made that the English common law rule that a cause of action for injury to the person did not survive the death of the wrongdoer was in conflict with the Constitution of the United States. Since the adoption of the Fourteenth Amendment, there has been no claim in any action in any state (if we except the Grainger and Wilfong cases) that the English common law rule above stated was in conflict with that amendment.

Rule That Constitutional Question Tardily Raised May Not Be Considered Does Not Extend to Cases Where Question Is Considered and Decided

In *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 53 S. Ct. 145, it was said:

> "The rule (against the consideration of a constitutional question untimely raised) does not extend to cases where the constitutional question, however tardily raised, is considered and decided."

In the present case of *Rehn* v. *Bingaman*, the opinion of April 14, 1949, says:

> "Contrary to defendant's contentions, in re Estate of Samson, 142 Neb. 556, 7 N.W. (2d) 60, 144 A.L.R. 264, did not by any manner or means overrule, modify or repudiate the conclusions reached in re Estate of Grainger, supra, and Wilfong *v.* O. & C. B. Ry. Co., supra, *to which we still adhere.*"

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Including, of course, the *Equal Protection of the Laws* conclusion.

In June, 1949, after Appellant Bingaman had received the Nebraska Supreme Court opinion, State of Nebraska ex rel. *State Railway Commission* v. *Ramsey*, he prepared a second motion for rehearing and brief in support thereof, and duly requested the Supreme Court of Nebraska for leave to file such motion and brief.

By such request, motion and brief Appellant Bingaman raised the constitutional question involved in the discrepancy between the rule announced by the Supreme Court of Nebraska in the *Rehn* v. *Bingaman* opinion of April 14, 1949, and the *Railway Commission v. Ramsey* opinion of May 13, 1949.

The opinion of May 13, 1949, was a new and unexpected basis for the assertion, by Appellant Bingaman, of a federal question (see *Bunkerhoff Faris Trust Co.* v. *Hill*, 281 U. S. 673, 50 S. Ct. 451). He did not know, and he could not have anticipated that the Nebraska Supreme Court would hold as controlling in the *Ramsey* case a rule of interpretation which, in the opinion of April 14, 1949 (*Rehn v. Bingaman*) it had disregarded. No objection, on the ground of the untimeliness in raising the federal question is, therefore, valid.

In *Great North Ry. Co.* v. *Sunburst Oil & Refining Company*, 287 U. S. 358, 53 S. Ct. 145, the opinion stated a rule which is particularly applicable to the present case:

> "One line of assault upon the judgment is a challenge to the constitutional validity of the ruling in this case whereby the statute is adjudged to mean one thing for some cases and another thing for others. This latter objection the petitioner could not make in advance of the event."

In the present case, Appellant Bingaman could not prior to May 13th make the objection that the rule governing the interpretation of constitutional provisions was different on May 13, 1949, the date of the rendition of the *Railway Commission* v. *Ramsey* opinion, than it was on April 14, 1949, the date of the rendition of the opinion in the case of *Rehn* v. *Bingaman.*

The following excerpts from Appellant Bingaman's second motion for rehearing and brief in support thereof further disclose the presentation by Appellant Bingaman of the constitutional questions involved in this action:

> *"Motion for Rehearing*
>
> Comes now appellant Arthur Bingaman, Administrator of the Estate of Alvin A. Bingaman, Deceased, and requests the Court to grant him a rehearing in the above entitled case in order that this case may be re-examined in connection with the rule announced in Syllabus 9 of the opinion of this Court in State ex rel. State Railway Commission *v.* Ramsey, General Number 32576, to determine if the opinion in Rehn *v.* Bingaman should be modified to conform to the opinion in State ex rel. State Railway Commission *v.* Ramsey, General Number 32576."
>
> *"Brief in Support of Motion for Rehearing*
>
> In State of Nebraska ex rel. State Railway Commission *v.* James D. Ramsey, General Number 32576, filed May 13, 1949, Syllabus 9 is as follows:
>
> > 'The meaning of the constitutional provision is to be determined as of the time of its adoption and the intent and understanding of the framers and the people who adopted it as the principal inquiry in construing it.'
>
> The case of First Trust Company *v.* Smith, 134 Neb. 84, 277 N.W. 762 is cited in support of the foregoing rule.

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We asked the Court in our original brief to establish the foregoing rule of law in our case. Proposition of Law XIV, in our original brief, is as follows:

> 'The meaning of a Constitution is fixed when it is adopted. It is not different at any subsequent time when a court has occasion to pass upon it.'
> First Trust Co. *v.* Smith, 134 Neb. 84, 277 N.W. 762."

"Proposition of Law XXX of our original brief is as follows:

> 'A Court is not at liberty to construe into the Constitution new principles which did not exist at the time of its adoption.' "

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"On page 181 of our original brief, it is stated as follows:

> 'In First Trust Company *v.* Smith, supra, the Supreme Court laid down the following rule:
>
> " 'In the absence of expressed contrary intention, the adoption of a statutory or constitutional provision from another state accepts the meaning of such adopted provision that it carried in the context of which it originally formed a part, and if it had been previously construed by the courts of such state, the judicial determination thus made.'

" 'Applying the above rule, it may be said that in all the constitutions of all the states from which the State of Nebraska might have adopted the provisions

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contained in Sec. 9, Art. I, Const. 1867, all of these states at that time, without exception, followed the rule—'Actio personalis moritur cum persona' (a personal action dies with the person). The 1885 edition of Bouvier's Law Dictionary, 17 years after the Nebraska

Constitution was adopted, in discussing the applicability of the maxim to personal injuries, says:

> "'In cases of injuries to the person, * * * if either the party who received or he who committed the injury die, the maxim applied rigidly and no action at common law can be supported either by or against the executors or other personal representatives. But in one respect this rule has been materially modified in England by Lord Campbell's Act, and in this country by enactments of similar purport in many of the states.'"

Appellant recognizes that Section 1, Amendment XIV, does not assure immunity from judicial error or uniformity of judicial decisions. But appellant contends that such section does assure immunity from arbitrary application of rules for the interpretation of constitutional provisions.

That the rule that the meaning of a Constitutional provision is to be determined, as of the time of its adoption, is substantiated by the *Nebraska* case of in re Warner's Estate, 137 Neb. 25, 288 N.W. 39, and *State* v. *Hauser*, 137 Neb. 138, 288 N.W. 518, in which it was said: "The purpose of the constitutional provision guaranteeing the right of trial by jury was to preserve the right AS IT EXISTED AT *COMMON LAW* and under statutes in force when the Constitution was adopted."

The pertinence of the above statement to the interpretation of Section 13, Article I, is so obvious that further explanation is unnecessary, but its applicability may be briefly and aptly stated: "Constitutional requirement that certain remedy be afforded for every injury was not intended to create new rights or remedies not in existence at time of adoption, but was designed to protect use of courts for *such rights and remedies as were recognized at time of adoption, and as might thereafter be created.*" *State ex*

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rel National Refining Co. v. *Seehorn,* 127 S.W. (2d) 418 (Mo.)

We may make an extension of the rule, that a meaning of a constitutional provision is to be determined as of the time of its adoption, to the Federal Constitution, and that the rules of the common law operate restrictively in respect to the various clauses of such constitution. In *Patton* v. *U. S.*, 50 S. C. 253, 70 A.L.R. 263, it was held that the guaranty of the right to trial by jury meant a trial according to the settled rules of the COMMON LAW.

It seems to have been assumed that the rule of interpretation to be applied to Section 1, Amendment XIV, was that the Section was to be interpreted in a manner similar to the Section of the Constitution guaranteeing right of trial by jury. For instance, in the case of *Cincinnati, H. & D. Ry. Co.* v. *McCullom,* 109 N.E. 206, 183 Ind. 556, affirmed 1917, 38 S. Ct. 64, 245 U. S. 632, it was assumed that the English common law embodied in the maxim, "Actio personalis moritur cum persona," was not in conflict with Section 1, Amendment XIV, Constitution of the United States. There was not the slightest suggestion that the maxim was repugnant to the Fourteenth Amendment.

The opinion of the Supreme Court of Nebraska, appended to this statement, affirmatively shows that the Federal question was presented to, considered and decided by it, in that the decision is based solely on the *Grainger* and *Wilfong* cases. And in the *Grainger* and *Wilfong* cases, Section 49-101, which adopts as the common law of Nebraska that part of the common law of England, NOT INCONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES, is involved, discussed and applied, in connection with the plaintiff Ward's demand for "*Equal protection of the laws,*" which is a clause taken, not from the Nebraska Constitution, but the U. S. Constitution. In the *Wilfong* case, which is likewise cited as a basis for the decision in the

case at bar, the Grainger opinion was cited with approval, and likewise Section 49-101 was cited, discussed and applied. The inconsistency, and discrimination complained of in appellant Bingaman's Supreme Court briefs, in applying the Nebraska statutory law, common law and constitution law so as to give to Rehn, a living injured person, a cause of action against the personal representative of an alleged tort-feasor, when the Nebraska Court had held that the personal representative of a person charged with the wrongful death of another was immune from suit . . . any reference to such inequality in treatment, it is true, was ignored in the opinion of April 14, 1949, and such disregard of the inequality complained of is inexplicable and could not have been anticipated. But appellant Bingaman contends that he adequately presented to the Supreme Court of Nebraska in his original briefs in the Supreme Court of the State of Nebraska, and in his brief on motion for rehearing the inequality of the discrimination. Appellant Bingaman contends that he should not be held lacking in diligence in failing to anticipate that the Supreme Court of Nebraska would adhere to a rule of law, which has no counterpart in the law of any other State in the United States—Nebraska is the only State in the Union which, without statutory provisions providing for survival of causes of action for personal injury, holds that such statutory causes of action survive by virtue of a modification of the English common law. Particularly so, when the only possible bases for the Grainger and Wilfong decisions had been demolished.

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Federal Question Involved and Necessary Determined in the Grainger and Wilfong Cases

In Vol. 48, Harvard Law Review, page 1013, appears the following analysis of the *Grainger* case, and the reasoning on which it was based:

> "And decisions which have allowed survival of certain causes by what amounts to JUDICIAL LEGISLATION (43)."
>
> Footnote 43—"Although the survival statute did not so provide, the Nebraska Supreme Court held that because a personal injury action did not abate by the plaintiff's death under the revival statute, EQUAL PROTECTION OF THE LAWS WOULD BE DENIED if similar causes not in litigation did not survive the wrongdoer's death. In re Estate of Grainger, 121 Neb. 338, 237, N.W. 153."

In Vol. 14, #3, Nebraska Law Bulletin (Feb. 1936), the basis of the *Grainger* case is likewise stated:

> "The case of in re Grainger's Estate adequately covers the situation where the wrongdoer has died prior to the bringing of the action against him. It was there held that an action for personal injuries may be prosecuted against the estate of a decedent whose negligence is alleged to have been the proximate cause of the injury. In that case it was argued and apparently approved by the Court, that it *IS NOT EQUAL PROTECTION OF THE LAWS*, to deny to a plaintiff the right to recovery against the decedent's estate when, under the laws of the jurisdiction, above referred to, the right to recover from a living tort-feasor has been granted to a dead person's estate.'

Moon v. *Bullock*, 151 Pac. (2) 765, likewise stated the basis for the *Grainger* decision.

> "And, apparently, the Court (the Nebraska Court) accepts the argument made by the claimant (plaintiff)

'That *IT IS NOT AN EQUAL PROTECTION OF THE LAW* to deny to her the right of recovery against the decedent's estate when, under our decisions as noted above, the right to recover from a living tort-feasor has been granted to a dead person's estate.' "

V. The Federal Questions Involved Are Substantial

In the case of *Cincinnati, H. & D. Ry. Co.* v. *McCullom*, 109 N.E. 206, affirmed 38 S. Ct. 64, 245 U.S. 632, an Indiana statute which provided for the survival of actions to recover damages for personal injuries was involved. In affirming the action of the Indiana court in holding that the statute was valid, the Supreme Court of the United States, in a memorandum opinion, cited decisions to the effect that a State legislature could make a reasonable classification.

There has been, so far as petitioner has been able to discover, no case involving a modification of the common law rule as to the survival of causes of action for personal injuries, presented to the Supreme Court of the United States, wherein the constitutionality of a classification made, not by the legislature, but by the judicial branch of a State government, was questioned.

Neither has there been, so far as petitioner has been able to discover, any case in which the question of the repugnancy of the English common law regarding the survival of a cause of action to Section 1, Amendment XIV, Constitution of the United States, was involved, been presented to the Supreme Court of the United States.

The substantiality and importance of the Federal question involved in the present action is manifest, if it be remembered that a holding by the Supreme Court of the United States that the part of the English common law above referred to is repugnant to and in conflict with the Constitution of the United States, would invalidate the rules as to the survival of causes of action for personal injuries

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which are now in effect in numerous States of the United States.

The record in this case raises the question whether or not the interpretation and application to appellant of Nebraska constitutional and statutory law abridges his privileges (which, of course, include the equal protection of the laws), denies him due process of law and equal protection of the law. It raises the question as to whether or not the Judicial branch of a State government may make a classification of tort-feasors—and, if it can, may it make a classification without any reasonable basis?

VI. Cases Believed to Sustain Jurisdiction

Great Northern Railway Co. v. *Sunburst Oil & Refining* Co., 287 U. S. 358, 53 S. Ct. 145.

Cincinnati, H. & D. R. Co. v. *McCullom,* 109 N. E. 245 U. S. 632, 38 S. Ct. 64.

Furman v. *Nichol,* 8 Wall. 44, 19 L. Ed. 370.

Dehnke-Walker Co. v. *Bondurant,* 257 U. S. 282.

Standard Oil Co. v. *Johnson,* 316 U. S. 481, 62 S. Ct. 1168.

Butler Bros. v. *McColgan,* 315 U. S. 501, 62 S. Ct. 701.

> "It is not necessary that the particular provision of the Constitution which the appellant says has been violated in its application to their case should be contained in the pleadings. If the record shows, either by express averment, or by clear and necessary intendment, that the constitutional question did arise and that the court below could not have reached the conclusion and judgment it did reach without applying it in the case at hand, the jurisdiction of the Supreme Court attaches."
>
> —*Furman* v. *Nichol,* 8 Wall, 44, 19 L. Ed.

Supreme Court Has Jurisdiction

It is, therefore, respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal under Section 1257 (2), Chapter 81, Part IV, Title 28 United States Code.

CRANNY & MOORE,
Attorneys for Appellant.

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APPENDIX

ERIC H. REHN, Appellee,

v.

ARTHUR BINGAMAN, Administrator of the Estate of Alvin A. Bingaman, Deceased, Appellant, Impleaded with JOHN P. MAINELLI, Doing Business Under the Name and Style of Mainelli Construction Company, Appellee.

N. W. 2d

Filed April 14, 1949. No. 32592.

1. Courts: Constitutional Law. In view of the self-executing provisions of Article I, section 13, Constitution of Nebraska, courts of this state must be open at all times to afford a remedy by due course of law for any injury done a party in his person, without denial or delay, and without reference to and wholly unaffected by the subsequent death of the wrongdoer or the party wronged.

2. ——: ——. Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a district court in such that the county court, under powers so conferred, is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises.

3. Executors and Administrators. The word "claim" includes every species of liability which an executor or an administrator of an estate can be called upon to pay, or provide for payment, out of the general fund of the estate.

4. ———. A contingent claim against an estate is one where the liability depends upon some future event or contingency which may or may not even occur, and which therefore makes it wholly uncertain whether or not there ever will be a liability. Such contingency does not relate simply to the amount which may be recovered but to the uncertainty of whether or not the future event will ever occur to thereby effect a right of action or liability.

5. Torts: Executors and Administrators. Liability upon an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future, and is not a contingent claim, since of necessity such a claim must be based upon the theory that the event, the tort giving rise to liability, has already occurred, and that a cause of action has already accrued and is in existence.

6. Abatement and Revival. A cause of action for personal injuries alleged to have been proximately caused by negligence of a decedent during his lifetime survives, and when no action was brought thereon during his lifetime, it must be prosecuted by a claim filed against the estate of decedent in the county court which has exclusive original jurisdiction thereof.

7. Negligence: Workmen's Compensation. A party's right of action for negligence against a third person with whom he has no contractual relation as employer and employee, is not a right given by section 48-118, R. S. 1943, but a common-law right previously existent and preserved thereby.

8. Workmen's Compensation. The term "third person," appearing in section 48-118, R. S. 1943, means any person other than the employer or those whom the Workmen's Compensation Act makes an employer, and thus includes fellow employees.

APPEAL FROM THE DISTRICT COURT FOR DOUGLAS COUNTY:

Frank M. Dineen, Judge. Reversed and dismissed.

CHAPPELL, J.:

This original action was filed in the district court for Douglas County, against Arthur Bingaman, administrator of the estate of Alvin A. Bingaman, deceased, to recover damages for personal injuries alleged to have been proximately caused by the negligence of deceased during his lifetime. John P. Mainelli, doing business as Mainelli Construction Company, was made defendant for the sole purpose of protecting his right to subrogation as provided in

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section 48-118, R.S. 1943, of the Workmen's Compensation Act.

After trial to a jury, plaintiff was awarded a verdict and judgment. Defendant administrator's motion for judgment of dismissal notwithstanding the verdict, and for new trial, were overruled, whereupon he appealed. His brief contains 32 assignments of error, but as we view the record, only two propositions of law require discussion and decision to dispose of the cause. They both relate to jurisdiction of the subject matter, and are respectively: (1) Did plaintiff's cause of action survive the death of Alvin A. Bingaman, in other words, was there then existent a subject matter over which any competent court could exercise jurisdiction, and if so, (2) did the district court have original jurisdiction of the subject matter in any event, since the alleged tort occurred and plaintiff's alleged cause of action arose during the lifetime of Alvin A. Bingaman, but no action thereon was filed until after his death, and was then brought against the administrator of his estate. We conclude that the cause of action survived, but that the district court did not have original jurisdiction of the subject matter thereof.

This court has heretofore affirmatively adjudged the question of survival under almost identical circumstances, but has never directly passed upon the question of the district court's original jurisdiction of causes like the one at bar.

In re Estate of Grainger, 121 Neb. 338, 237 N. W. 153, 78 A.L.R. 597, a claim for damages for personal injuries alleged to have been proximately caused by negligence of deceased during his lifetime, was, after his death resulting from the same accident, filed against his estate in the county court for Lancaster County. Demurrer thereto was sustained and the claim was dismissed. Appeal therefrom was taken to the district court where an amended demurrer to the first cause of action for personal injuries, as pleaded in the petition on appeal, was sustained and the cause dismissed. An appeal therefrom was taken to this court, where the judgment was reversed.

"The right to an action for personal injury does not abate by reason of the death of the wrongdoer before the action was brought."

Likewise, in Wilfong *v.* Omaha & C.B. St. Ry Co., 129 Neb. 600, 262 N.W. 537, after citing with approval and quoting from In re Estate of Grainger, supra, and Waller *v.* First Savings & Trust Co. 103 Fla. 1025, 138 So. 780, it was held. "In view of the self-executing provisions of section 13, art. 1 of our Constitution, courts of this state must be open at all times to afford a remedy by due course of law for any injury done 'a party' in his person, without denial or delay, and without reference to and wholly unaffected by the subsequent death of the wrongdoer or the party wronged."

Admittedly, there are authorities from other jurisdictions which have reached contrary conclusions, but it appears that they have done so either under statutes or constitutional provisions different from our own, or regardless, have applied strictly the common-law rule of "actio personalis moritur cum persona" to the full extent of its original scope, which in the light of its conflict with our organic law and statutes, as well as our modern needs and conditions, this court has refused to do.

Contrary to defendant's contention, in re Estate of Samson, 142 Neb. 556, 7 N.W. 2d 60, 144 A.L.R. 264, did not by any manner or means overrule, modify, or repudiate the conclusions reached in In re Estate of Grainger, supra, and Wilfong *v.* Omaha & C.B. St. Ry. Co., supra, to which we still adhere.

That case is clearly distinguishable upon the facts. Therein a claim for widow's allowance was denied in the county court. She appealed, but died while the appeal was pending in the district court. The executor of her estate then sought revivor, to which a plea in abatement was overruled, and the cause of action was revived in the name of her executor. This court, upon appeal therefrom, reversed the judgment and dismissed the action, concluding that the cause of action did not survive the widow's death, hence there was nothing to revive since the widow's claim for allowance was purely a personal right to support, created by statute, section 30-103, R. S. 1943, which she alone could enjoy during her survival, and then only for a limited period in any event. In other words, on a par with Williams *v.* Williams, 146 Neb. 383, 19 N.W. 2d 630, the subject matter,

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the widow's status of personal survival which formed the basis of her cause of action for support while living, was destroyed by her death, and there was nothing left to survive thereafter.

In re Estate of Samson, supra, held in part: "A cause of action created by statute does not survive unless declared so to do by the statute itself or by provisions for its survival made by some other statute."

In the light thereof, defendant herein argued that since plaintiff's cause of action was one created by section 48-118, R. S. 1943, then In re Estate of Samson, supra, controlled the case at bar, citing Muncaster *v.* Graham Ice Cream Co., 103 Neb. 379, 172 N.W. 52, relied upon in O'Donnell *v.* Baker Ice Machine Co. 114 Neb. 9, 205 N.W. 561. We cannot so hold.

In that connection, it will be observed that the proviso contained in section 48-118, R.S. 1943, was added thereto by Chapter 135, Laws of Nebraska, 1929, p. 489, after the foregoing opinions were written, thereby making ineffective the obiter dicta appearing in Muncaster *v.* Graham Ice Cream Co. supra, to the effect that such sections gave "to the injured employee a right of action where the injury complained of grew out of carelessness or negligence of a third party, * * *."

The proviso now reads: "* * * that nothing in this section or act shall be construed to deny the right of an injured employee or of his personal representative to bring suit against such third person in his own name or in the name of the personal representative based upon such liability, * * *." It then simply directs that "in such event an employer having paid or paying compensation to such employee or his dependents shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid."

As we view it, the concurring opinion in Muncaster *v.* Graham Ice Cream Co., supra, to the effect that "plaintiff's right of action, if any, against * * * a third person with whom he had no contractual relations, is not given by the workmen's compensation act" was confirmed by the 1929 amendment, as the original legislative intent. See Oliver *v.* Nelson, 128 Neb. 160, 258 N.W. 69.

We conclude that the employee's right of action against third persons for negligence proximately causing his injuries was a common-law right already existent outside of and notwithstanding the Workmen's Compensation Act. In other words, section 48-118, R. S. 1943, not only preserved the employee's common-law right to recover from third persons as it was before the act, but also, in the final analysis, simply gave the right of legal subrogation to his employer without depriving the employer of his right to equitable subrogation under circumstances requiring its application. Burke *v.* Parker, 143 Neb. 373, 9 N.W. 2d 471.

Defendant argued that deceased was not an independent contractor but a fellow employee of plaintiff, and thus not a third person within the purview of section 48-118, R. S. 1943. Whether deceased was an independent contractor or a fellow employee we are not required to decide. In any event, whether he was the one or the other is of no importance because he would be such a third person in any event. Concededly, an independent contractor would be such a third person, and it is generally the rule that a fellow employee would also be such person regardless of the capacity of his employment, so long as he did not occupy the relationship of employer of plaintiff. 57 C.J.S., Master and Servant, § 578, p. 348; 35 Am. Jur., Master and Servant, § 525, p. 954, and § 526, p. 955; Annotation, 99 A.L.R., p. 422, Hudson *v.* Moonier, 94 F. 2d 132, 102 F. 2d 96.

In McGonigle *v.* Gryphan, 201 Wis. 269, 229 N.W. 81, citing other cases, and quoting Zimmer *v.* Casey, 296 Pa. St. 529, 146 A. 130, it was said: " 'When the term "third party" is mentioned in the workmen's compensation act, it means any person other than the master or those whom the act makes master, and the employee who is seeking compensation under their agreement. The act is careful to preserve the status of a third person by not defining the term; so the presumption must be that the law as to third persons in every respect stands as it was before the act.' " See, also, Allen *v.* Trester, 112 Neb. 515, 199 N.W. 841, and Fonda *v.* Northwestern Public Service Co., 134 Neb. 430, 278 N.W. 836, indicating the same conclusion. To hold otherwise would unjustly confer upon every employee freedom to neglect his duty toward a fellow employee and

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thus escape with impunity from all liability for damages proximately caused by his own negligence.

Since the cause of action survived, we turn to the question of whether or not the district court had original jurisdiction of the subject matter thereof. In doing so, we conclude that it did not, but that, as argued by defendant, the plaintiff's remedy, if any, was by claim originally filed in the county court against the estate of Alvin A. Bingaman, deceased.

In that connection, Article V, section 16, Constitution of Nebraska, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship; appointment of guardians, and settlement of their accounts; and such other jurisdiction as may be given by general law: * * *."

In discussing the foregoing constitutional provisions and the exclusive original jurisdiction thereby vested in the county court, it was said in Williams *v.* Miles, 63 Neb. 859, 89 N.W. 451: "To it resort must first be had for the protection of any right or the granting of any relief to which a party may be entitled, growing out of or arising from the subjects mentioned. In view of the authority and jurisdiction thus conferred on county courts as courts of record having original jurisdiction, can it be seriously doubted that such court is empowered to grant the relief to which a party may be entitled, whether founded upon either legal or equitable grounds, or whether the character of the action is such as properly may be denominated either an action at law or in equity? * * * On principle and authority the conclusion, we think, is inevitable that in granting the relief to which a party is entitled, or the protection of his rights when the subject of litigation comes within the jurisdiction of the county court, it may exercise all the powers of a court of general jurisdiction, either legal or equitable, which pertain to the subject over which it is given such jurisdiction." See also, In re Estate of Statz, 144 Neb. 154, 12 N.W. 2d 829, with relation to the constitutional provision aforesaid, and sections 24-503 and 24-504, R. S. 1943, discussed infra.

Section 24-503, R.S. 1943, provides: "The county court shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons, * * *." Section 24-504, R.S. 1943, also provides: "The county court shall have power (1) to hear and determine claims and set-offs in the matter of estates of deceased persons: * * *." Section 30-601, R.S. 1943, provides: "When letters testamentary or of administration, or of special administration shall be granted by any court of probate, or during any appeal from such order, it shall be the duty of the judge of the court to receive, examine, adjust and allow all lawful claims and demands of all persons against the deceased; * * *."

2 Woerner, The American Law of Administration (3d ed.) § 391, p. 1265, lists 28 states, including Nebraska "in which the power to try claims has been conferred upon courts of probate jurisdiction: * * *." Thereafter, in § 392, p. 1268, it is said: "But the power to try claims against the estates of deceased persons includes all actions upon which a money judgment can be rendered, whether growing out of contract or tort, whether legal or equitable in their nature.

In Hendreschke *v.* Harvard High School District, 35 Neb. 400, 53 N.W. 204, it was held: "Where a statute upon a particular subject has provided a special tribunal for the determination of questions pretaining to such subject, the jurisdiction of such tribunal is exclusive, unless otherwise expressed or clearly implied from the act." See, also, Armstrong *v.* Mayer, 60 Neb. 423, 83 N.W. 401. Here such a tribunal, the county court, was not only expressly provided by statute but also by the organic law of this state.

As held In re Estate of Edwards, 138 Neb. 671 294 N.W. 422: "The word 'claim' includes every species of liability, which an executor or an administrator of an estate can be called upon to pay, or provide for payment of, out of the general fund of the estate." See, also, 34 C.J.S. Executors and Administrators, § 367, p. 95.

As stated in Stevenson *v.* Valentine, 38 Neb. 902, 57 N.W. 746: "In the district court no claim against the estate of a deceased person is provable, originally, except upon appeal as to the same from the county court."

In Craig *v.* Anderson, 3 Neb. Unoff. 638, 92 N.W. 640,

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it was held: "The district courts of this state have no original jurisdiction to allow claims against the estate of a decedent or to order the payment of such claims out of funds in the hands of the administrator." See, also, Dame, Probate and Administration (3d ed.), § 385, p. 400.

Therefore, particularly applicable is the holding in Stewart *v.* Herter, 125 Neb. 210, 249 N.W. 552: "Where exclusive jurisdiction of a subject-matter is conferred on county courts; and where relief sought in an action pertaining thereto but instituted in a district court is such that the county court under these powers so conferred is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises."

Section 30-801, R.S. 1943, provides: "No action shall be commenced against the executor or administrator except actions to recover the possession of real or personal property, and actions for relief other than for the recovery of money only, and such actions as are permitted in sections 30-704, 30-705, 30-706, and 30-714; * * *."

Clearly, plaintiff's cause of action, including his employer's right to subrogation as well, come within the prohibition of the aforesaid section as actions for the recovery of money only. Drainage District *v.* O'Neill, 109 Neb. 552, 191 N.W. 685; Krotine *v.* Link, 36 Ohio App. 537, 173 N.E. 443; Reed *v.* Ramey, 82 Ohio, App. 171, 80 N.E. 2d 250.

We are confronted with the question then of whether or not plaintiff's right, as argued by him, was a contingent claim within the provisions of sections 30-704, 30-705, 30-706, and 30-714 R. S. 1943, which was required to be first made absolute by a decree of the district court before presentation against the estate of deceased in the county court. We conclude that it was not.

A contingent claim against an estate is one where the liability depends upon some future event or contingency which may or may not occur, and which therefore makes it wholly uncertain whether there ever will be a liability. The contingency does not relate simply to the amount which may be recovered, but to the uncertainty of whether or not the future event will ever occur, to thereby effect a right of action or liability. In re Estate of Bolton, 121 Neb. 737, 238 N. W. 358; Parker *v.* Luehrmann, 126 Neb. 1, 252 N. W.

402; 21 Am. Jur. Executors and Administrators, § 356, p. 582; 34 C. J. S. Executors and Administrators, § 377, p. 122; Dame, Probate and Administration (3d. ed.), p. 425, § 415.

As stated in Pierce *v.* Johnson, 136 Ohio St. 95, 23 N. E. 2d 993, 125 A.L.R. 867: "A liability on an unliquidated claim for damages arising out of a tort does not depend for its creation upon the occurrence of some uncertain event in the future. On the contrary, such claim is, as of necessity it must be, based on the theory that the tort, giving rise to liability, has already occurred, and that a cause of action has already accrued and is in existence. A claim thus grounded cannot be said to be contingent." See also, Hicks *v.* Wilbur, 38 R. I. 268, 94 A. 872, wherein it was said: "Whether the claimant in tort will recover is uncertain; but this is true of all claimants, whatever be the nature of their claims, whether for liquidated or unliquidated damages, or whether the claim arises in tort or in contract; and, if such claimants are allowed to recover, the amount of the damages which may be awarded is uncertain, but these circumstances do not render their claims contingent. A contingent claim within the meaning of the statute is one that depends for its effect upon some future event which may or may not happen. Until that event happens a right of action upon said claim does not arise."

We conclude, therefore, that although plaintiff's cause of action survived, the district court had no original jurisdiction of the subject matter thereof, and in conformity with our holding in Schmidt *v.* Henderson, 148 Neb. 343, 27 N. W. 2d 396, and Lippincott v. Wolski, 147 Neb. 930, 25 N. W. 2d 747, 169 A.L.R. 1236, the judgment herein should be and hereby is reversed and the cause is dismissed.

Reversed and Dismissed.

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In Re Grainger's Estate

Ward

v.

Lincoln Nat. Bank & Trust Co.

No. 27896

Supreme Court of Nebraska

June 5, 1931

1. *Abatement and revival.*

Action for injuries may be brought against estate of decedent whose negligence is claimed to have caused injury (Comp. St. 1929, #20-1401, 20-1402, 49-101).

Syllabus by the Court

An action for personal injuries may be prosecuted against the estate of a decedent whose negligence is alleged to have been the proximate cause of the injury.

2. *Abatement and revival.*

Right of action for personal injuries resulting from negligence held not to abate on wrongdoer's death before commencement of action (Comp. St. 1929, #20-1401, 20-1402, 49-101).

Syllabus by the Court

The right to an action for personal injury does not abate by reason of the death of the wrongdoer before the action was brought.

Appeal from District Court, Lancaster County; Frost, Judge.

Proceeding by Dorothy H. Ward to establish a claim against the Estate of Ernest B. Grainger, deceased, opposed by the Lincoln National Bank & Trust Company, administrator. From a judgment dismissing the claim, claimant appeals.

Reversed, with directions.

DEAN, J.

This is an appeal by Dorothy H. Ward from the dismissal of her claim in the district court for Lancaster county against the estate of Ernest B. Grainger, deceased, for $20,250, as damages for personal injuries which she alleged she sustained, on or about November 9, 1929, while she was riding with Grainger, as his invited guest, in his Packard automobile which was then being driven by him on a public highway between Lincoln and Omaha. Ten days thereafter, namely, on November 19, 1929, Grainger died from the effects of the injuries which he sustained in the accident. On May 1, 1930, this action against his estate was begun.

The Lincoln National Bank & Trust Company, as administrator of the decedent's estate, filed an amended demurrer, wherein it alleged that the claim "is not a proper and lawful claim under the laws of the state of Nebraska; that said claim, if any, abated with the death of Ernest B. Grainger, deceased, and that said claim and claims do not constitute a cause of action against the estate of Ernest B. Grainger, deceased." The court sustained the amended demurrer as to the first cause of action, namely, the sum of $20,250, but, as to the second cause of action, an item for $47 for the destruction of clothing worn by claimant at the time of the accident, it was agreed that proceedings on such claim should be suspended until an appeal had been perfected on this, the first cause of action.

The claimant alleged that before, and at the time of the accident, Grainger was driving the car at an excessive and highly dangerous rate of speed approximating 70 miles an hour, and that she urgently requested him to reduce the speed of his car, but that he gave no heed to her pleas. In respect of the accident, the claimant alleged that the Grainger car collided with a truck which was towing a wrecked car at an intersection of the highway, and that, as a result of the accident, she sustained severe and permanent injuries, and that, solely as a result of such collision, she has been totally unable to continue her occupation as an employee in a medical clinic.

(1, 2) It is the contention of the administrator that the action does not survive Grainger's death, and that, under

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the laws of this state, no lawful provision exists upon which such action can be sustained. Counsel for the claimant, however, contend that the common law rule that a cause of action does not survive the death of the tort-feasor is not applicable to existing modern conditions and that it does not prevail in Nebraska.

Section 20-1401, Comp. St. 1929, provides:

"In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

And in section 20-1402, Comp. St. 1929, we find this provision:

"No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office; which shall abate by the death of the defendant."

And section 49-101, Comp. St. 1929, contains this provision:

"So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the State of Nebraska."

From the provisions of section 49-101, above cited, it is clear that the common law exists in this state only where applicable and not inconsistent with the laws of this state. Bishop *v.* Liston, 112 Neb. 559, 199 N. W. 825; Kerner *v.* McDonald, 60 Neb. 663, 84 N. W. 92, 83 Am. St. Rep. 550.

Under the common law, a cause of action did not survive either the death of the wrongdoer or that of the person

injured. And, except as changed by statute in recent years, the common-law rule has very generally prevailed. As stated in Hambly *v.* Trott, 2 English Ruling Cases, 1, a decision rendered in 1776, the reasoning appears to have been that all private crimes die with the offender and that an executor cannot be held liable so far as a tort was there concerned; but, where the act of the offender involved a benefit to his estate, the executor was held chargeable. In later cases, however, it was held that actions involving injury to property interest also survived. Lansdowne *v.* Lansdowne, 1 Mad. (Endg.) 116.

There now appears to be a noticeable deviation from the common-law rule as applied to a tort committed by one who subsequently came to his death. It has been held that a cause of action does not abate with the death of the person injured, and that such injured person's estate or surviving relatives may recover from the wrongdoer for damages sustained by his death. Brown *v.* Chicago & N. W. R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L.R.A. 579. In Harris *v.* Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584, 586, 49 L.R.A. (N.S.) 897, Ann. Cas. 1914C, 885, the court held that an action might be maintained against the executor of an estate, as such, for defamatory words contained in a will, which was published for probate, on the ground that the maxim, actio personalis moritur cum persona, did not apply. The Court there said: "The determinative question, therefore, is whether a wrong has been inflicted for which plaintiff is entitled to recover lawful damage, and not whether there is a precedent for the suit." And the court, in the above cited Harris Case, quoted from Jacob *v.* State, 3 Humph. (Tenn.) 493, wherein this language was used:

"The common law of a county will, therefore, never be entirely stationary, but will be modified, and extended by analogy construction and custom, so as to embrace new relations, springing up from time to time, from an amelioration or change of society. * * * Though principles once established by judicial determination can only be changed by legislative enactment; yet such is its malleability (if we may use the expression) that new principles may be de-

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veloped, and old ones extended by analogy, so as to embrace newly created relations and changes produced by time and circumstances."

We have held that a pending action for personal injuries does not abate by the death of the injured person, but may be revived by the decedent's personal representative. Webster *v.* City of Hastings, 59 Neb. 563, 81 N. W. 510; Murray *v.* Omaha Transfer Co., 98 Neb. 482, 153 N. W. 488, 7 A.L.R. 1343. See, also Levin *v.* Muser, 107 Neb. 230, 195, N. W. 431. But there has not been a decision pointed out bearing directly on the facts herein, nor do we know of any in this state. The claimant argues that it is not an equal protection of the laws to deny to her the right of recovery against the decedent's estate when, under our decisions, as noted above, the right to recover from a living tort-feasor has been granted to a dead person's estate.

We do not think that the claimant should be precluded from presenting the facts pertaining to the accident and her injuries. Nor does any valid reason appear that should tend to prevent her from being heard upon the presentation of her cause of action.

The judgment of the district court must be and it hereby is reversed, with directions that the claimant, if so advised, be permitted to present her cause in manner and form provided by law.

Reversed.

Endorsed. 32592. Rehn *v.* Bingaman. Statement in support of jurisdiction. Supreme Court of Nebraska. Filed June 20, 1949. George H. Turner, Clerk.